

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number: WA 148/07
File Number: 5087663

BETWEEN PRISCILLA TOROA
(Applicant)

AND DEPARTMENT OF LABOUR
(Respondent)

UNDER The Parental Leave and Employment
Protection Act

Member of Authority: P R Stapp

Representatives: Applicant on her own behalf
Natasha Szeto for the Department

Conference Call Held 18 June 2007 by Telephone

Submissions received: SOP dated 15 May 2007 from the Applicant¹.

SIR dated 1 June 2007 & Submission on 13 July 2007
from Respondent

Determination: 2 November 2007

DETERMINATION OF THE AUTHORITY

Application

[1] Priscilla Toroa has requested the Employment Relations Authority to make a determination on a ruling made by the Department of Labour on her eligibility to receive paid parental leave. The department ruled that she was not eligible for the 14 week taxpayer funded paid parental leave payments.

Issues

[2] Is the Applicant entitled to a paid parental leave payment?

¹ The Applicant was offered the right to reply to the Respondent's Submission dated 13 July 2007 on notice. Since that time the applicant has not replied by 31 October 2007.

The facts

[3] Priscilla Toroa took legal guardianship of a child (through Parenting and Guardianship Orders) to care for a child full time, but that child is not available for adoption.

[4] She applied for parental leave from her employer that was granted for 52 weeks commencing on 27 November 2006. This is a wider application of parental leave arrangements by agreement of the Applicant's employer. This is because the parental leave was granted for the Applicant to be a full time guardian which is not provided under the PLEPA eligibility criteria. There is no evidence of any other arrangements between the parties. The Applicant's last day of duty at work was 27 October 2006 with other leave arrangements in place before the start of her parental leave. Her position at work was as a Personal Assistant at the Ministry of Health. It was agreed that her position would be held open and filled on a temporary basis while she was on leave.

Determination

[5] Section 4 of the Parental Leave and Employment Protection Act 1987 ("PLEPA") makes provision for more beneficial parental leave arrangements to apply. However this is constrained by section 71 CA (2) where those benefits are **ignored** for the statutory entitlements under this section of the Act; and sections 7 and 8 of the PLEPA restrict entitlement for statutory parental leave to pregnancy and adoption respectively.

[6] The relevant sections of the PLEPA are as follows:

4 *Application of this Act to employees who have non-statutory rights to parental leave*

(1) *Parts I to V apply to all employees except employees who have rights and benefits in the nature of parental leave that are,-*

(a) *in their overall effect, as favourable to that employee than, the rights and benefits provided for in Parts I to V; and*

- (b) *provided under a comprehensive employment agreement or other arrangement (other than this Act).*
- (2) *An employment agreement or other arrangement is **comprehensive** if it effectively addresses all of the following matters:*
 - (a) *the conditions of eligibility for any parental leave:*
 - (b) *the duration of parental leave:*
 - (c) *the degree of protection provided for the employee's position in the employment of the employer during, subsequent to, any absence on parental leave:*
 - (d) *the employer's obligation or lack of an obligation to pay remuneration during parental leave:*
 - (e) *the procedural requirements relating to parental leave.*
- (3) *The provisions of an employment agreement or other arrangement that is not comprehensive are of no effect in so far as the provisions relate to parental leave.*
- (4) *Parts VI to 7A apply to all employees.*

7 Entitlement of female employee to maternity leave

Except as otherwise provided in this Act, every female employee-

- (a) *Who becomes pregnant...*

8 Entitlement of adoptive mother to maternity leave

(1) Except as otherwise provided in this Act, every female employee-

- (a) *Who assumes (with a view to adoption by her or by her and her spouse [or partner] jointly) the care of a child who is not more than 5 years of age; and...*

71A Purpose

The purpose of this Part is to entitle certain employees and self employed persons to take up 14 weeks of parental leave payments out of public money when they take parental leave.

71C Interpretation of this Part

Eligible employee has the meaning given in section 71C

71CA Definition of eligible employee

- (1) *In this part, **eligible employee** means-*
- (a) *a female employee who meets the criteria for maternity leave for the child under section 7, or*
 - (b) *an employee who meets the criteria for parental leave for the adopted child under section 8 or section 18 or section 24; or*
 - (c) *an employee to whom all or part of an entitlement to a parental leave payment is transferred under section 71 ; or*
 - (d) *an employee who succeeds to all or part of an entitlement to a parental leave payment under section 72 B.*
- (2) *Rights and benefits to non-statutory parental leave (and section 4) are ignored when considering whether a person is an eligible employee under this section.*

71D Entitlement to parental leave payment [for employees]

- (1) *An employee is entitled to a parental leave payment under this part if the employee-...*
- (c) *is an eligible employee.*

[7] Guardianship is not deemed as one of the methods by which a child is taken in to care for adoption under the PLEPA. In particular s 33 reads as follows:

33 Requirements where child to be adopted

Where the employee is proposing to adopt a child, the notice required to be given under section 31 (1) of this Act shall,-

- (a) *Where the placing of the child in the home of the employee has been approved by a social worker under section 6(1) (a) of the Adoption Act 1955,-*
 - (i) *Be given within 14 days after the date on which the employee receives notice that a child will be placed with the employee..., or by the employee and the employee's spouse[or partner] jointly; and*
 - (ii) *Be accompanied by a letter from a Social Worker (as defined in section 2 of the Adoption Act 1955) stating*

that the employee is keeping a child in the employee's home with a view to adoption;

- (b) *Where a Court has made an interim order under section 6(1) (b) of the Adoption Act 1955,-*
 - (i) *Be given within 14 days notice after the date on which the order is made; and*
 - (ii) *Be accompanied by a certified copy of the order:*
- (c) *Where the child is otherwise lawfully in the employee's home under section 6(4) of the Adoption Act 1955,-*
 - (i) *Be given 14 days after the date on which the employee makes a statutory declaration to the effect that the employee has assumed the care of the child with a view to adoption by the employee, or by the employee and the employee's spouse [or partner] jointly, and*
 - (ii) *Be accompanied by a copy of the declaration.*

[8] Legal guardianship is not covered under the provisions of the PLEPA. The entitlement is confined to pregnancy, and adoptions (and proposed adoptions) under the Adoption Act 1955.

[9] It appears uncontested by the Applicant that she is not adopting the child. Nothing has been provided by the Applicant to support the entitlement criteria of section 33 of the PLEPA above.

[10] Under section 71D (1) (c) of the PLEPA, an employee is only *entitled* to a parental leave payment under the PLEPA if they are an *eligible employee* when they take parental leave (see sections 71A and 71CA of the PLEPA).

[11] Parental leave can include non statutory parental leave. However it is constrained by sections 7 (“Entitlement of female employee to maternity leave”) and 8 (“Entitlement of adoptive mother to maternity leave”) applying to employees for a statutory entitlement that includes the paid leave under the PLEPA (applying Part 7 of the PLEPA).

[12] Under section 71CA (2) the provision of non statutory parental leave is ignored when a statutory entitlement applies.

[13] I am further supported in my conclusion by:

- (i) the PLEPA applies to *certain employees* (see section 71 A of the PLEPA),
- (ii) Parts VI to 7A apply to all employees under the PLEPA, and
- (iii) an employee to obtain the parental leave payment must be an *eligible employee*.

[14] Guardianship is not covered by the Act. In the department's submission the comment was made that there are indications that consideration may be given to "*parental leave eligibility*" of certain caregivers who are currently excluded from the parental leave regime. I was referred to a commentary on the Parental Leave and Employment Protection (Paid Parental Leave for Self Employed Persons) Amendment Bill (4 April 2006) made by the Transport and Industrial Relations Select Committee where it said:

"We also considered submissions seeking the recognition of whāngai and other customary adoptions... we understand the department is looking into this matter. We would support consideration of any further legislation to extend paid parental leave to parents in these groups."

[15] Under the present law the Applicant is not entitled to paid parental leave because in the circumstance of this case she does not meet the statutory eligibility for a statutory provision of paid parental leave out of public money under the PLEPA.

[16] The Applicant's claim is dismissed.

[17] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority